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Supreme Court of the United States

October Term, 1934

No. 60

THE INDIANA FARMER'S GUIDE PUBLISHING COMPANY,

Petitioner

vs.

THE PRAIRIE FARMER PUBLISHING COMPANY, et al.,

Respondents

On Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF

Supplemental Statement of Facts

In the opening part of their brief (p. 2), respondents say that the particular complaint of the petitioner is to the effect that respondents have made a combination advertising rate which is cheaper than their individual rates and that this operated in restraint of interstate commerce.

This is an incomplete and therefore a misleading statement of petitioner's complaint, as stated in

the pleadings and proven on the trial. We call the Court's attention to the bill of complaint, count I, paragraphs (7), (8) and (10), (R. 5, 6); count III, paragraph (7), (R. 7, 8).

Following paragraph (8), count I, the complaint reveals (R. 6) the evil fruits of respondents' unlawful scheme and design by showing that while the petitioner has a larger circulation than the Indiana Edition of the Prairie Farmer and was in a more favorable position to receive farm paper advertisements, it was unable to compete successfully with the combination set-up; and, "that the purpose and effect of the combination agreement and schedule is to destroy the competition presented by the plaintiff's publication in the State of Indiana, and to break down and destroy the plaintiff's business, and to give it a monopolistic control of such business in the State of Indiana and the adjoining states."

Respondents' statement (pp. 2-7, their brief) of the circulation of farm magazines throughout the United States, the number circulated in Indiana, and the relation in percentage which the advertisements carried in respondents' publications bear to the total advertisements in all the so-called farm papers during the period in controversy, is also so incomplete as to call for a supplemental statement of record facts.

From the record recital of the testimony by respondents' witness Gill (R. 127-128) we quote:

> "Farm papers are classified as national farm papers, which is a paper that circulates over the Union in substantially all the states; and technical and vocational, as they are generally known. A technical publication is a paper that appeals to dairy farmers or any particular class of farming. The vocational paper is the same as a technical paper. And then the other is the state and local farm paper—sometimes called sec-

tional. Some people call state farm papers sectional farm papers and some of them call them state papers and some call them local papers. I understand the meaning of a sectional paper to be a paper that covers a given section. For intance, some people call the Wallaces' Farmer and Iowa Homestead a sectional paper because it covers part of Nebraska and some of Illinois and some of Missouri. Its circulation is not limited to the State of Iowa. Assuming that state and national (sectional) papers are the same thing, there now is published in Illinois one—The Prairie Farmer; one in Nebraska—The Nebraska Farmer. In 1928 there were published in Illinois, the Prairie Farmer and the Illinois Farmer. The Illinois Farmer was taken over by the Prairie Farmer.

"The Court: How many are there in Indiana?

"The Witness: There is two, what we call two Indiana farm papers: The Prairie Farmer, Indiana Edition, and The Indiana Farmer's Guide. The Farm Life that was published at Spencer, Indiana, a while, was more or less national. It isn't published now. As to how long it has been suspended is one of those things that go out of your mind. I don't pay any attention to it. Just one state paper published in Iowa—Wallace's Farmer and Iowa Homestead; just one in Nebraska—The Nebraska Farmer; one in Minnesota—The Farmer and Farm, Stock and Home; one in Wisconsin—Wisconsin Agriculturist and Farmer. The Farmer and Farm, Stock and Home, that is a Minnesota paper published at St. Paul. The two editions are the Minnesota Edition

> and the Dakota Edition. I don't know whether they are published at the same place. I don't know whether the Prairie Farmer, Illinois Edition, and the Indiana Edition are published at the same place. I have never seen the printing of the paper. I understand that is true, but I don't know it definitely."

It thus appears that all comparisons made, both in elements of comparative circulations and advertisements carried, were comparisons between the respondents' publications and the total field of so-called farm publications, with practically none of which the publications involved in this case are in substantial competition.

Respondents' statement (p. 14, their brief) of section 2 of the Sherman Act is incomplete in that it omits vital provisions. As stated in petitioner's former brief (p. 40) the section is:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *"

At page 23 of respondents' brief, the statement is made to the effect that the petitioner makes no complaint about the circulation of its paper, but only as to the making of contracts for advertisements, which do not involve any movement of goods in interstate commerce. But, as a matter of fact, the complaint shows that the revenues received from the advertising business is the life blood on which the publication is dependent, and that the purpose of the

respondents' unlawful activities is to destroy the petitioner's business, which would necessarily force a suspension of its publication.

Respondents undertake to narrow the issues with the statement (p. 27, their brief) to the effect that the petitioner's claimed injury is concerned only with the State of Indiana, whereas it clearly appears from the bill of complaint that the respondents, through their concerted activities, are seeking to destroy competition and obtain a monopoly of the business in which they are engaged in the eight states wherein "their publications are mainly circulated, viz., the states of Indiana, Illinois, Wisconsin, Iowa, Nebraska, Minnesota, North Dakota and South Dakota" (R. 7).

At page 35 of their brief, respondents say that the only objection the petitioner seems to find to exhibit No. 41 is "it includes the so-called national farm papers, which are not in any essential sense competitors of any of the publications involved in this litigation." The full objection as shown by the Record (p. 122) was:

> "We object to the competency of this evidence for the reason that it shows on its face that it comprises total advertising in national, state and sectional farm papers, which makes it irrelevant, and that it includes many papers which are not in any essential sense competitors of any of the publications involved in this litigation."

At page 11 of petitioner's prior brief, there is a computation based upon the same advertising lineage data as are given in respondents' Exhibit 41, but including only those papers which are (or were) published in the eight states comprising the Midwest Unit, and including, also, the various national farm papers therein listed. The following table, also

based upon Exhibit 41, shows the total lineage carried by all of the state and general farm papers—excluding the national farm journals—published in this territory; the total advertising lineage carried by respondents' papers, and the per cent of respondents' lineage to the whole:

	Total Lineage Carried by all Papers	Total Lineage Carried by Respondents' Papers	Per Cent of Respondents' Lineage to Total
1928	5,928,365	3,323,256	56.06
1929	5,409,217	3,235,364	59.81
1930	4,053,766	2,980,963	73.53
1931	2,777,865	2,207,650	79.47
1932	1,736,470	1,439,753	82.91

(Respondents' Exhibits 29, 32, 35, 38 [R. 83, 93, 103, 113] show where the publications enumerated in Exhibit 41 are published.)

Respondents' Propositions and Authorities Analyzed

I

The petitioner does not dispute the correctness of respondents' proposition I.

II

Respondents' proposition II is: "The primary purpose of the (Sherman) Act is to foster competition." This, we believe, is inaccurate; rather, the primary purpose of the Act is to prevent the suppression of natural and reasonable competition. As bear-

ing upon this and other questions within the issues, we make brief analysis of the authorities cited under proposition II, as follows:

In ***Whitwell*** v. ***Continental Tobacco Co.,*** 125 Fed. 454, as stated in the opinion (page 456),

> "The main question which the case presents is, may one engaged in commerce among the states lawfully select his customers, and sell only to those who do not buy or sell the wares of his competitors, or is such a restriction of his ***own trade*** by a manufacturer or merchant and his employes a 'contract, combination or conspiracy in restraint of trade' or an 'attempt to monopolize any part of trade,' within the meaning of the (Sherman) act . . . ?" (Our italics)

Going on (p. 457):

> "Under this act, every contract, combination, and conspiracy in restraint of trade among the states is illegal. Every person who engages in any such combination violates this law, and a corporation is a person (citing Act). Hence the real question in every case which arises under this law is whether or not the contract, combination or conspiracy challenged is in restraint of trade among the states. It has now been settled by the repeated decisions of the Supreme Court that this question must be tried, not by the intent with which the combination was made, nor by its effect upon traders, producers, or consumers, but by the necessary effect that it has in defeating the purpose of the law. That purpose was to prevent the stifling or substantial restriction of competition, and the test of legality

> of a combination under the act which was inspired by this purpose is its direct and necessary effect upon competition in commerce among the states. If its necessary effect is to stifle or to directly and substantially restrict free competition, it is a contract, combination, or conspiracy in restraint of trade, and it falls under the ban of the law.
>
> "If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade within the true interpretation of this act, and it is not subject to its denunciation."

In ***Board of Trade*** v. ***United States,*** 246 U. S. 231, the facts were that the defendant Board had adopted what was known as the "Call" rule. By it members were prohibited from purchasing or offering to purchase, during the period between the close of the Call and the opening of the session on the next business day, any grains "to arrive" at a price other than the closing bid at the Call, which usually was over by two o'clock. Before the adoption of the rule, members fixed their bids throughout the day at such prices as they respectively saw fit. After the adoption of the rule, the bids had to be fixed at the day's closing bid on the Call until the opening of the next session. Suit was brought by the Government under the provisions of the Sherman Act to enjoin the enforcement of the Call rule. The District Court granted the injunction.

The language found in the opinion just preceding that which respondents quote in their brief

(p. 15) goes far toward showing why the Supreme Court reversed the case. It is as follows:

> "The Government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to anyone. The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law."

At pages 240, 241 of the opinion, the Court lists nine separate respects in which the Call rule helped to improve market conditions.

III

Petitioner concedes the correctness of respondents' third proposition, namely, that restraint of trade must be direct, and not incidental or indirect. But the evidence in the Record shows that the restraint of which complaint is made herein is direct, and not merely incidental or indirect. As applied to the facts at bar, respondents' cases—***Hopkins*** v. ***U. S., 171*** U. S. 578, and ***Anderson*** v. ***U. S.,*** 171 U. S. 604—are not in point. The language used by this Court in ***Swift & Co.*** v. ***U. S.,*** 196 U. S. 375, 397 distinguishes these two cases:

> "So again the line is distinct between

this case and ***Hopkins*** v. ***United States,*** 171 U. S. 578. All that was decided there was that the local business of commission merchants was not commerce among the States, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect and not within the act. Whether the case would have been different if the combination had resulted in exorbitant charges, was left open. In ***Anderson*** v. ***United States,*** 171 U. S. 604, the defendants were buyers and sellers at the stock yards, but their agreement was merely not to employ brokers, or to recognize yard-traders, who were not members of their association. Any yard-trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the States, and, being formed with a different intent, was not within the act."

In the third case cited under this proposition, ***United States*** v. ***American Linseed Oil Co.,*** 262 U. S. 371, the facts are more analogous. The District Court had dismissed the Government's bill praying for an injunction. The Supreme Court, in reversing the case, took the position that the "defendants are associated in a new form of combination and are resorting to methods which are not normal" (p. 389). At page 390 the Court said:

"* * * In the absence of a purpose to

monopolize or the compulsion that results from contract or agreement, the individual certainly may exercise great freedom; but concerted action through combination presents a wholly different problem and is forbidden when the necessary tendency is to destroy the kind of competition to which the public has looked for protection."

IV

As to respondents' proposition IV, that agreements concerning advertising rates are not interstate commerce, the correctness of the point necessarily depends upon the character of the particular agreement and its normal bearing upon interstate commerce.

In its prior brief (page 20), petitioner has distinguished the case of ***Blumenstock Bros.*** v. ***Curtis Publishing Co.,*** 252 U. S. 436, upon which authority respondents base their contention.

V

Respondents' proposition V is: "A combination to sell a product by joint effort of owners at agreed prices is not violative of the Sherman Anti-Trust Act if the members do not control a major part of the product." This point rests upon the two cases of ***Standard Oil Co.*** v. ***U. S.,*** 283 U. S. 163, and ***Appalachian Coals*** v. ***U. S.,*** 288 U. S. 343. Inasmuch as these cases have been analyzed in petitioner's previous brief (pages 28-32), no further reference to them need be made.

Argument

In petitioner's former brief (p. 11), a table of comparative lineage is set out, wherein it is shown that from the years 1928 to 1932, both inclusive, the total lineage carried by respondents, in comparison with the total carried by all farm papers published in the eight states comprising the Midwest Unit, increased from 44.37 per cent to 66.92 per cent.

In respondents' brief (p. 31) the computations carried in this table are criticized as being "fallacious, because they are based upon an utterly untenable premise." Further characterizing them, respondents say: "They are based on the place where the papers are ***published,*** and not on the place where the papers are ***circulated.*** It is clear that competition for advertising is not at all based upon the place of publication,—it is based on the place of the circulation."

This criticism, however, overlooks the intimate relation of the place of publication with that of circulation, and especially as applied to papers of the class involved in this controversy—state farm papers.

In justification of the argument that competition for advertising in state farm papers depends, to a great extent, upon the place of their publication, we point out the comparative domestic and foreign circulation of petitioner's and respondents' several publications (Exhibits 30 and 31; R. 85, 87):

The Indiana Farmer's Guide

Total approximate circulation	161,000
Circulation in Indiana	113,000

The Prairie Farmer

Total approximate circulation	317,000
Approximate circulation in Illinois	184,000
In Indiana (Indiana Edition)	100,000

The Wisconsin Agriculturist and Farmer

Total approximate circulation	184,000
In Wisconsin	170,000

Farmer and Farm Stock and Home

Total approximate circulation	272,000
In Minnesota	143,000
In the Dakotas (Dakota Edition)	96,000

The Nebraska Farmer

Total approximate circulation	124,000
In Nebraska	102,000

Wallace's Farmer and Iowa Homestead

Total approximate circulation	245,000
In Iowa	192,000

It thus will be seen that advertisers seeking coverage in a given state or section would naturally favor the state or sectional papers, in the absence of such unfair and destructive competition as that adopted by the respondents.

The petitioner has set out a further computation (ante, p. 6) showing the total lineage carried by respondents' papers, in comparison with the total lineage carried by all state and general farm papers published within the eight states, covering the years 1928 to 1932, both inclusive, wherein it is shown that

the comparative percentage of respondents' lineage was increased from 56.06 in 1928, to 82.91 per cent in 1932. These showings, we submit, graphically disclose the effects of the concerted activities of which complaint is made. During the period, several competing state farm papers were swept from the territory (Exhibit 41; R. 123). The losses which the petitioner has sustained, as shown by the undisputed evidence, carry the explanation.

In the petitioner's original brief, the respondents' main arguments were anticipated and the principal authorities relied upon were distinguished. Extended reply seemingly would serve no useful purpose. The respondents' defense seems more artful than convincing.

That the effect of the combination complained of and the offer of a full page of advertising matter in each of the seven respondent publications, including the Indiana Edition of The Prairie Farmer, for $297.20 less than the cost of a full page in only six of the publications (excluding the Indiana Edition of The Prairie Farmer) is to destroy the petitioner as a competitor, is borne out fully by the comparative records of the earnings and revenues of the several publications involved, as elsewhere pointed out in our original brief; and the motive, whatever it may be, would not legalize the transaction. But as bearing upon the motive by which the respondents were in fact actuated, Exhibit No. 13 (R. 54, 55), wherein specific reference is made and challenge issued to advertisers to use the Indiana Edition of The Prairie Farmer instead of The Indiana Farmer's Guide, is a strong indication that the design back of the combination was to destroy the petitioner as a competitor.

In conclusion, we again recall that the case is brought to this Court from a judgment resting on an

instructed verdict. The record discloses that there was substantial evidence tending to support each element of the case, both as to unlawful restraint, forbidden by section 1 of the Act; and monopolistic endeavor, condemned by section 2.

We earnestly urge that the judgment of the Courts below should be reversed.

Respectfully submitted,

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